

# Decision Notice

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**Decision 122/2019: Mr R and Transport Scotland**

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**M8/M73/M74 Improvement Project works**

Reference No: 201900352

Decision Date: 15 August 2019



Scottish Information  
Commissioner

## Summary

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Transport Scotland was asked about the landscape planting works for the M8/M73/M74 roadworks contract. Transport Scotland withheld some information which it considered to be commercially confidential and said it did not hold some of the information requested.

During the investigation, Transport Scotland changed its position and stated it did not hold information it had previously withheld on the basis that it was commercially confidential.

The Commissioner investigated and found that Transport Scotland had partially complied with the EIRs in responding to the request. While he was satisfied that Transport Scotland did not hold the information requested, he found that it had wrongly informed the applicant that some of the information was being withheld.

## Relevant statutory provisions

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The Environmental Information (Scotland) Regulations 2004 (the EIRs) regulations 2(1) (Interpretation) (paragraphs (a) and (c) of definition of “environmental information”); 5(1) and (2)(b) (Duty to make available environmental information on request); 10(1), (2), 4(a) and (5)(e) (Exceptions from duty to make environmental information available)

The full text of each of the statutory provisions cited above is reproduced in Appendix 1 to this decision. The Appendix forms part of this decision.

## Background

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1. On 3 November 2018, Mr R made a five-part information request to Transport Scotland, which included the following questions:
  - (i) What is the value of the landscape planting works (trees, shrubs and grass areas) for the M73/M74/M8 roadworks contract?
  - (ii) What proportion of the works have been signed off as completed and paid for as of 31 October 2018?
2. The remaining parts of the request do not form part of Mr R’s application to the Commissioner.
3. Transport Scotland responded on 9 January 2019, having considered the request under the EIRs.
  - (i) It told Mr R that the project operated under a Design Build Finance and Operate (DBFO) contract, and so it could not disaggregate the amount spent on landscape planting works from the overall cost of the project.
  - (ii) It refused to disclose what proportion of works had been signed off as completed and paid for under regulation 10(5)(e) of the EIRs, on the basis that the information was commercially confidential. It considered there was no public interest in disclosing information that would cause substantial harm to the commercial interests of the

contractor. Transport Scotland provided a link<sup>1</sup> to the project's contract documents, suggesting that Schedule 6, the Payment Mechanism might be useful.

4. On 23 January 2019, Mr R wrote to Transport Scotland requesting a review of its decision:
  - (i) He did not accept it was impossible to separate the landscaping and planting costs from the main contract. Mr R argued that this was public money and, under the terms of a competitive bidding process, the information should be available to the public (as he believed would be normal practice). Mr R stated his main concern was to ensure the landscape and planting works detailed on the contract documents and drawings were fully carried out.
  - (ii) He contended that, assuming the contract was being monitored correctly and only paid-for operations completed, it should be relatively easy to assess a simple percentage of the completed planting works. Mr R stated his main concerns surrounded assurances given that much of the landscaping works had been completed, yet the contract drawings showed large areas where works had not been carried out.
5. Transport Scotland notified Mr R of the outcome of its review on 20 February 2019.
  - (i) It upheld its original decision on the value of the landscaping works with modification. While Transport Scotland maintained it could not disaggregate the cost of the landscape planting works from the total cost (and so did not hold the information requested), it acknowledged that its original response had failed to specify that it was relying on the exception in regulation 10(4)(a) of the EIRs. Transport Scotland recognised that there may be public interest in information about the value of the landscape planting works, but clearly could not provide information it did not hold.
  - (ii) It fully upheld its original decision. Transport Scotland explained that payments to the contractor were not calculated relative to the completion of specific operations, but were made relative to the road network being provided for public use and the overall status of the works in accordance with the contract payment mechanism. Transport Scotland stated that full payment would only be made to the contractor when the works (including the landscaping works) were completed in accordance with the specification.
6. On 24 February 2019, Mr R wrote to the Commissioner's office, applying to the Commissioner for a decision, in terms of section 47(1) of the Freedom of Information (Scotland) Act 2002 (FOISA). By virtue of regulation 17 of the EIRs, Part 4 of FOISA applies to the enforcement of the EIRs as it applies to the enforcement of FOISA, subject to specified modifications.
7. Mr R stated he was dissatisfied with the outcome of Transport Scotland's review because he disagreed with the exceptions applied and believed it was in the public interest for the information to be disclosed.

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<sup>1</sup> <https://www.transport.gov.scot/media/8153/m8m73m74-motorway-improvements-contract-schedule-6-web-version.pdf>

## Investigation

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8. The application was accepted as valid. The Commissioner confirmed that Mr R made a request for information to a Scottish public authority and asked the authority to review its response to that request before applying to him for a decision.
9. On 11 April 2019, Transport Scotland was notified in writing that Mr R had made a valid application. Transport Scotland was asked to send the Commissioner the information withheld from Mr R for part (ii) and the case was allocated to an investigating officer.
10. On 26 April 2019, Transport Scotland informed the Commissioner that it had changed its position in relation to this part of the request and withdrew its reliance on regulation 10(5)(e). It stated that it now wished to rely on regulation 10(4)(a) of the EIRs as it did not hold the information requested. Transport Scotland provided Mr R with a revised review outcome for part (ii) of his request, in these terms.
11. Section 49(3)(a) of FOISA requires the Commissioner to give public authorities an opportunity to provide comments on an application. Transport Scotland was invited to comment on this application and to answer specific questions. These focused on the searches carried out by Transport Scotland to identify any information falling within the scope of parts (i) and (ii) of Mr R's request.
12. Mr R was also invited to comment on Transport Scotland's change of position for part (ii) of his request, and to provide any further comments on the public interest in this case.
13. Both parties provided submissions to the Commissioner.

## Commissioner's analysis and findings

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14. In coming to a decision on this matter, the Commissioner has considered all of the relevant submissions, or parts of submissions, made to him by both Mr R and Transport Scotland. He is satisfied that no matter of relevance has been overlooked.

### Handling in terms of the EIRs

15. Transport Scotland considered Mr R's request under the EIRs, having concluded that the information requested was environmental information as defined in regulation 2(1) of the EIRs.
16. Where information falls within the scope of this definition, a person has a right to access it (and the public authority has a corresponding obligation to respond) under the EIRs, subject to the various restrictions and exceptions contained in the EIRs.
17. Transport Scotland submitted that the information requested by Mr R related to works forming part of a major infrastructure project which would have a significant effect on the state of the elements of the environment. It argued that the elements of land, landscape and soil would be directly impacted in terms of the development and maintenance of these landscaped areas. As such, Transport Scotland considered that information relating to the costs and proportion of landscape planting works completed, if held, would fall within the definition of environmental information in regulation 2(1) of the EIRs.
18. The Commissioner accepts this as a reasonable description and, in the circumstances, is satisfied that the information requested by Mr R falls within the definition of environmental information set out in regulation 2(1), in particular paragraphs (a) and (c) of that definition.

Mr R has not challenged the Council's decision to deal with the information as environmental information and the Commissioner will consider the handling of the request in what follows solely in terms of the EIRs.

### **Regulation 5(1) of the EIRs - Duty to make environmental information available**

19. Regulation 5(1) of the EIRs requires a Scottish public authority which holds environmental information to make it available when requested to do so by any applicant. This obligation relates to information that is held by the authority when it receives a request.
20. On receipt of a request for environmental information, therefore, the authority must ascertain what information it holds falling within the scope of the request. Having done so, regulation 5(1) requires the authority to provide that information to the requester, unless a qualification in regulations 6 to 12 applies (regulation 5(2)(b)).
21. Under the EIRs, a Scottish public authority may refuse to make environmental information available if one or more of the exceptions in regulation 10 apply, but only if (in all the circumstances) the public interest in maintaining the exception or exceptions outweighs the public interest in making the information available.

### **Regulation 10(5)(e) – Confidentiality of commercial or industrial information**

22. At both initial response and review stages, Transport Scotland informed Mr R that it was withholding information under regulation 10(5)(e) of the EIRs. Regulation 10(5)(e) allows a Scottish public authority to refuse to make environmental information available to the extent that its disclosure would, or would be likely to, prejudice substantially the confidentiality of commercial or industrial information where such confidentiality is provided for by law to protect a legitimate economic interest.
23. As stated above, during the investigation, Transport Scotland withdrew its reliance on regulation 10(5)(e). It submitted that it had initially applied this exception to the information redacted from the published version of the DBFO Schedule 6 Payment Mechanism. However, on further consideration of this document, Transport Scotland recognised that it did not contain the specific information requested.
24. Transport Scotland provided the Commissioner with a copy of its revised review outcome issued to Mr R on 29 April 2019, in which it informed him of its change of position for this part of his request.
25. Having considered the submissions from Transport Scotland explaining why the information was initially considered excepted from disclosure and why it subsequently changed that position, the Commissioner finds that Transport Scotland wrongly applied regulation 10(5)(e). Having reached this conclusion, he is not required to consider the public interest test in regulation 10(1)(b) of the EIRs.
26. The Commissioner concludes, therefore, that Transport Scotland was not entitled to rely upon regulation 10(5)(e) of the EIRs to withhold the information Mr R asked for in part (ii) of his request and, by so doing, breached regulation 5(1) of the EIRs.
27. Given that, by the conclusion of the investigation, Transport Scotland had issued Mr R with a revised review outcome for part (ii) of his request, effectively withdrawing its reliance on regulation 10(5)(e) of the EIRs and substituting the exception in regulation 10(4)(a), he does not require Transport Scotland to take any specific action in relation to this failure.

28. However, the Commissioner would urge Transport Scotland, and indeed all Scottish public authorities, to ensure that, when responding to information requests, thorough consideration is given to whether the information requested is actually held, and if so, whether any applicable test of substantial prejudice can actually be met in the circumstances.

### **Regulation 10(4)(a) – Information not held**

29. Regulation 10(4)(a) of the EIRs states that a Scottish public authority may refuse to make environmental information available to the extent that it does not hold that information when the applicant's request is received.
30. The standard of proof in considering whether a Scottish public authority holds information is the civil standard of the balance of probabilities. In determining this, the Commissioner will consider the scope, quality, thoroughness and results of the searches carried out by the public authority. He will also consider, where appropriate, any reason offered by the public authority to explain why the information is not held. While it may be relevant as part of this exercise to explore what information should be held, ultimately the Commissioner's role is to determine what relevant information is (or was, at the time the request was received) held by the public authority.

#### *Transport Scotland's submissions*

31. In its submissions to the Commissioner, Transport Scotland provided some background to the M8/M73/M74 Improvement Project, which operates under a DBFO contract. Transport Scotland explained that under a DBFO contract, a single contractor -- possibly a special purpose vehicle (SPV), a legal entity set up for a specific purpose to isolate risk -- is appointed to design and build the project, and operate it for a period of time. Under this arrangement, the contractor finances the project and leases it to the client for an agreed period, following which the development reverts to the client.
32. For this particular contract, Transport Scotland explained that the SPV was the Scottish Roads Partnership (SRP), which had been awarded the contract to design, build, fund and operate the project for a 30 year concession period until 2047. Under the contract's governance arrangements, Transport Scotland administers payments to SRP monthly for services, as calculated in Schedule 6 of the Payment Mechanism (referred to in its original response). As the level of service payment (Unitary Charge) is linked to the availability of lanes on the roads, and not to the proportion of works completed, Transport Scotland explained that the service payments will increase when the two sections of the new road become available for use. Once all works have been completed, the contractor will be paid 100% of the services payment in accordance with the Payment Mechanism (Schedule 6).
33. Given that the project operates under a DBFO contract, Transport Scotland submitted that the level of detail requested by Mr R was not typically information that it would be likely to hold.
34. Transport Scotland explained the searches it had carried out to identify any information falling within the scope of the parts of Mr R's request under consideration here:
- The Project Manager and Project Sponsor were consulted, given these were the officials most likely to be aware of the information held. A sample of the invoices and payment certificates provided by SRP to Transport Scotland were reviewed, along with monthly reports submitted by the contractor. These searches, Transport Scotland submitted, ascertained that while the documents recorded the monthly cost of the contract, they did not provide a detailed breakdown of each of its elements.

- Documents provided at tender stage, and the project's Financial Model, were also reviewed in the interest of completeness, but these did not record the level of detail requested by Mr R.
35. Transport Scotland believed the searches carried out were sufficient to identify any information held for parts (i) and (ii) of Mr R's request, given that a small team of policy officials had a good knowledge of the information held in relation to this request.
  36. Transport Scotland further submitted that, while the contractor issued monthly invoices, these did not break down the costs in sufficient detail to allow the cost for each element to be separated out. Transport Scotland provided examples of monthly invoices from the contractor, plus a monthly payment calculation schedule.
  37. Noting that it had no business need to collect or retain such a level of detail, and there was no requirement under a DBFO contract to report on the specific cost of an element of work, Transport Scotland argued that it was under no obligation to obtain this information from SRP in order to be able to respond to a request for information. It submitted that it would be required to meet the cost of any additional resources employed by SRP in doing so.
  38. Transport Scotland suggested that Mr R appeared to consider this project to be the same as a capital funded project, where milestone payments are made relative to staged completion of elements of work, such as landscaping, and not a services contract where payments are made relative to services being provided. It emphasised that this was not the case.
  39. While recognising that there might be some public interest in information about the value, and percentage of landscaping works signed off as completed and paid for in relation to this project, Transport Scotland submitted that it clearly could not provide information which it did not hold.
  40. In conclusion, Transport Scotland submitted it was unable to identify the information requested from that held, and was satisfied that it did not hold the information requested in parts (i) and (ii) of the request.

#### *Mr R's submissions*

41. In his application to the Commissioner, Mr R highlighted concerns that the landscape and planting works carried out were not consistent with the contract drawings, that large planting areas remained incomplete and that there were inaccuracies in the reporting on this by supervisory staff. He argued that there was a public interest in ensuring that contracts were carried out in accordance with acceptable practice and that works were checked throughout the contractual and maintenance periods to ensure compliance with the contract.
42. Mr R further submitted that both the management and supervision of the landscape works, and the apparent incomplete and unsatisfactory planting operations, evidenced the failure of these works. He believed there was a public interest in disclosure of the information, as this would contribute to ensuring effective oversight of expenditure of public funds and the public obtaining value for money.

#### *The Commissioner's view*

43. Having considered all the relevant submissions by both parties and the terms of the request, the Commissioner is satisfied that Transport Scotland took adequate, proportionate steps to establish whether it held any information falling within the scope of parts (i) and (ii) of Mr R's request. He accepts that any information relevant to the request would have been capable of being identified using the searches described by Transport Scotland.

44. He has also taken into account the explanations submitted by Transport Scotland describing the level of information it does hold and the reasons why it does not believe it requires the level of detail requested by Mr R, together with the invoices and payment schedule provided in evidence of this.
45. As explained previously, the Commissioner can only consider what relevant information is actually held by Transport Scotland (or was held by it at the time it received Mr R's request). He cannot consider what information it should hold, or what Mr R might believe it should hold.
46. The Commissioner notes that Mr R clearly has concerns about the way in which landscaping works appear to be carried out under this contract. However, this is not a matter which the Commissioner can consider or comment on – it is not within his remit to do so.
47. In conclusion, the Commissioner is satisfied, on the balance of probabilities, that Transport Scotland does not (and did not, on receiving the request), hold any of the information requested by Mr R in parts (i) and (ii) of his request.

#### *The public interest*

48. The exception in regulation 10(4)(a) of the EIRs is subject to the public interest test in regulation 10(1)(b) and so can only apply if, in all the circumstances of the case, the public interest in maintaining the exception outweighs that in making the information available. In this case, for the reasons set out above, the Commissioner is satisfied that Transport Scotland does not (and did not, on receiving the request) hold any information covered by parts (i) and (ii) of Mr R's request. Consequently, he accepts that there is no conceivable public interest in requiring the disclosure of such information and finds that the public interest in making information available is outweighed by that in maintaining the exception.

## **Decision**

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The Commissioner finds that Transport Scotland partially complied with the Environmental Information (Scotland) Regulations 2004 (the EIRs) in responding to the information request made by Mr R.

The Commissioner finds that, by the conclusion of the investigation, Transport Scotland was correct to inform Mr R, in terms of regulation 10(4)(a), that it did not hold the information requested in parts (i) and (ii) of his request, and so complied with the EIRs.

However, he also finds that Transport Scotland wrongly informed Mr R, in its original review outcome, that it was withholding the information in part (ii) of the request under regulation 10(5)(e), and so failed to comply with regulation 5(1) of the EIRs.

Given that, during the investigation, Transport Scotland issued Mr R with a revised review outcome for part (ii) of his request in terms of regulation 10(4)(a) of the EIRs, the Commissioner does not require Transport Scotland to take any action in respect of this failure, in response to Mr R's application.



## **Appeal**

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Should either Mr R or Transport Scotland wish to appeal against this decision, they have the right to appeal to the Court of Session on a point of law only. Any such appeal must be made within 42 days after the date of intimation of this decision.

**Margaret Keyse**  
**Head of Enforcement**

**15 August 2019**

### The Environmental Information (Scotland) Regulations 2004

#### 2 Interpretation

- (1) In these Regulations –

...

"environmental information" has the same meaning as in Article 2(1) of the Directive, namely any information in written, visual, aural, electronic or any other material form on

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- (a) the state of the elements of the environment, such as air and atmosphere, water, soil, land, landscape and natural sites including wetlands, coastal and marine areas, biological diversity and its components, including genetically modified organisms, and the interaction among these elements;

...

- (c) measures (including administrative measures), such as policies, legislation, plans, programmes, environmental agreements, and activities affecting or likely to affect the elements and factors referred to in paragraphs (a) and (b) as well as measures or activities designed to protect those elements;

...

#### 5 Duty to make available environmental information on request

- (1) Subject to paragraph (2), a Scottish public authority that holds environmental information shall make it available when requested to do so by any applicant.

- (2) The duty under paragraph (1)-

...

- (b) is subject to regulations 6 to 12.

...

#### 10 Exceptions from duty to make environmental information available–

- (1) A Scottish public authority may refuse a request to make environmental information available if-

- (a) there is an exception to disclosure under paragraphs (4) or (5); and  
(b) in all the circumstances, the public interest in making the information available is outweighed by that in maintaining the exception.

- (2) In considering the application of the exceptions referred to in paragraphs (4) and (5), a Scottish public authority shall-

- (a) interpret those paragraphs in a restrictive way; and
- (b) apply a presumption in favour of disclosure.

...

(4) A Scottish public authority may refuse to make environmental information available to the extent that

- (a) it does not hold that information when an applicant's request is received;

...

(5) A Scottish public authority may refuse to make environmental information available to the extent that its disclosure would, or would be likely to, prejudice substantially-

...

- (e) the confidentiality of commercial or industrial information where such confidentiality is provided for by law to protect a legitimate economic interest;

...

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